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No. 517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

WINNEBAGO TELEVISION CORPORATION, *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, RADIO WISCONSIN, INC., and GREATER ROCKFORD TELEVISION, INC., *Respondents*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT, RADIO WISCONSIN, INC., IN OPPOSITION TO THE PETITION.

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BRIEF OF RESPONDENT, RADIO WISCONSIN, INC. IN OPPOSITION TO THE PETITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (petitioner's Appendix) is reported at 258 F. 2d 163. The basic decision of the Federal Communications Commission (R. 792-802) is reported at 22 FCC 356, and its decision denying reconsideration (R. 869-873) at 23 FCC 53.

JURISDICTION

The judgment of the court below, affirming the Commission, was entered on July 2, 1958. The petition was filed on November 14, 1958, pursuant to an extension of time therefor. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1) and 47 U.S.C. Sec. 402(j). The time for the filing of instant respondent's opposition has been extended to and including December 29, 1958.

RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

In the view of respondent Radio Wisconsin, Inc., the questions presented for review are:

1. Whether the court below properly sustained the Commission's decision on the basis of the FCC Docket 11754 record before it which had reaffirmed the allocation of VHF television Channel 3 at Madison, Wisconsin, and refused to reallocate that Channel as a non-commercial frequency in Madison or to shift it as a commercial frequency to the city of Rockford, Illinois.

2. Whether under the facts and circumstances here presented, this Court's action vacating the judgments of the court below in (Oct. Term, 1958) cases Nos. 235 and 242 requires similar disposition of this case.

SUPPLEMENTAL STATEMENT OF FACTS

The following facts, in respondent's view, should also be considered by the Court in evaluating the instant petition:

Respondent, Radio Wisconsin, Inc. (hereinafter Radio Wisconsin) is the licensee of commercial tele-

vision Station WISC-TV which operates on VHF television Channel 3 at Madison, Wisconsin. Station WISC-TV has been on the air since June 25, 1956, its original construction permit having been granted by the Commission on December 12, 1955, following and as the result of a protracted comparative proceeding between competing applicants.

The instant Petition for a Writ of Certiorari challenges the July 2, 1958 decision of the United States Court of Appeals for the District of Columbia Circuit which sustained Federal Communications Commission decisions of March 1, 1957 and June 24, 1957 reaffirming and retaining the allocation of television Channel 3 as a commercial frequency at Madison, Wisconsin as part of the Commission's nationwide Table of Television Assignments and rejecting, after hearing, proposals to delete that Channel for reallocation, either as an educational noncommercial facility in Madison or shifted as a commercial facility to Rockford, Illinois.

Petitioner Winnebago Television Corp. (hereinafter Winnebago) is the licensee of television Station WTVO operating on UHF Channel 39 at Rockford, Illinois. Its appeal was from that part of the Commission's decisions which denied Winnebago's counterproposal in Docket 11754 that Channel 3 be deleted entirely from Madison and be reallocated to Rockford to be used by its Station WTVO (with its transmitter at Orangeville, Illinois, some 30 miles from Rockford and 43 from Madison) in place of its present UHF frequency.

Television Channel 3 was originally allocated at Madison, Wisconsin, as part of the Commission's

April 14, 1952 Sixth Report and Order which finalized a four-year nationwide allocations proceeding involving all television channels by adopting a fixed Table of TV Assignments as Section 3.606 of its rules and regulations. (1 Pike & Fischer, RR Part 3, pp. 91:599 et seq.).[1] The Commission's decisions which are the subject of the instant petition represented the *sixth time over the past seven years* that the Commission has separately considered and rejected proposed reallocations of Madison Channel 3 and has determined and redetermined to retain that Channel as is as part of its nationwide allocations plan.

Generally dissatisfied with the recent failure of the television medium to develop on as extensive a nationwide basis as desired, the Commission on June 26, 1956 determined to consider a series of possible solutions to the problem. Firstly, by Report and Order of that date (in its Docket 11532), it undertook a long-range inquiry into the possibility of shifting all television into the newer UHF portion of the spectrum at some indefinite future time, which inquiry is ostensibly still underway with no fixed schedule for its resolution. At the same time the Commission (although rejecting proposals for an extensive, nationwide system of so-called "selective deintermixture" of individual channels as ineffective and impracticable),

[1] The allocation of a VHF Channel at Madison goes back in time even further to 1948, Radio Wisconsin having originally filed its application for a Madison VHF Station (then for Channel 9) in April of 1948. In its Sixth Report & Order, the Commission finalized its proposed allocation of a VHF Channel (#3) at Madison, expressly rejecting proposals for the prospective "deintermixture" of that city's commercial allocations by reserving Channel 3 for educational purposes. (Id., pp. 91:818.)

instituted on its own motion nine separate proceedings proposing to consider in the interim the possible reallocation of the VHF channels respectively allocated at nine separate communities. The stated purpose for the proposals was the possibility of increasing the opportunity for effective competition among a greater number of stations in each such city. Madison Channel 3 was the subject of one such proceeding (Docket 11754), pursuant to prescribed procedures calling for the Commission's separate case-by-case consideration of this proposed reallocation within the purview of certain suggested general criteria which had previously been enunciated in its aforesaid Report and Order in Docket 11532.

In the Commission's Madison-Channel 3 proceeding (Docket 11754) Radio Wisconsin, then operating WISC-TV on that frequency, extensively challenged the agency's lawful authority to consider or adopt such proposed reallocation and the procedures being utilized therewith, as well as opposing any reallocation as contrary to the public interest under the factual circumstances existing with respect to that particular frequency. Petitioner Winnebago, depending on the substantive and procedural legality of the proceeding for its counter-proposal, did not challenge them, but rather urged such reallocation to be in the public interest on factual and policy considerations.

After the separate rule making hearing on the proposed reallocation of Madison-Channel 3, the Commission (by 4-3 vote) reaffirmed that allocation and denied the reallocation proposals. Its decisions that the existing Madison Channel 3 allocation was in the public interest and reallocation contrary thereto, were

specifically grounded upon the indigenous facts and circumstances of the record in Docket 11754 relating to that particular frequency, within the purview of the enunciated general criteria. The Commission first denied the proposed reservation of Channel 3 for educational purposes (which would have looked toward shifting WISC-TV on Channel 3 into the UHF), on grounds that the record demonstration of educational inability to finance any forced conversion to Channel 3 "could well be the death knell of educational television in Madison." (22 FCC 356, 358.) The Commission then considered and denied the proposed reallocation of Madison Channel 3 to Rockford (which likewise would have forced WISC-TV off Channel 3 and into the UHF) as the necessary resultant of a number of compelling factors: Thus, it found and concluded that:

> (1) A close examination of all of the vast and disputed technical data of record in Docket 11754 established that an extensive loss of existing TV service would result from the proposed reallocation, (i.e., between 59,233 and 102,159 persons would thereby lose their only TV service, and an additional 51,000 to 62,000 persons would lose their second TV service). (Id., pars 9-10; 22 FCC 53, Par. 11, R. 157-161).[1]

[1] Petitioner's reference (p. 7) to its voluminous technical data significantly ignores the compelling fact that the Commission on the record of *all* such data concluded that that submitted by respondent Radio Wisconsin was generally accurate and reliable as well as conforming to the best data otherwise available to the agency, and that petitioner's data was unreliable and inaccurate, in part due to a faulty method of equipment calibration which involved "numerous opportunities for misleading results", and also as being out of line with the Commission's experience, with its estimated contours, and with other data before it relating to

(*Continued on next page*)

(2) The terrain to the north and west of Madison was rough and broken, and so not favorable to UHF propagation. (Id., pars. 7, 9).

(3) The population in these areas having only WISC-TV service was relatively scattered, without communities capable of supporting their own TV stations to replace deleted service. (Id., par. 7).

(4) The Madison area could not effectively be "deintermixed" by reallocation, since:

(a) Outside VHF stations provided recognized service to Madison's threshold, and served most of the Madison UHF's coverage area. (Id., par. 7).

(b) Channel 3 at Rockford would necessarily provide primary VHF service to Madison and almost all of the Madison UHF's coverage area. (Id., pars. 13-14).

(5) Madison, larger and with greater state and regional significance, had greater need for Channel 3, its *first* VHF, than did Rockford for its *second* VHF, under Section 307(b) of the Communications Act. (Id., par. 14).

(6) Reallocation would not improve and more likely worsen the competitive situation in Madison by bringing at least one powerful outside VHF service, straddling two markets, into that city and area. (Id., par. 15).

(7) Reallocation would not effectively improve Rockford's competitive situation by creating a different but still significant disparity between the coverage of Rockford's two stations that could be

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the rougher type of terrain found north and west of Madison, Petitioner has never challenged, nor does it here dispute, the Commission's factual conclusions on the engineering record of the Docket 11754 proceeding. (22 FCC 356, Pars. 9-10.)

eliminated only at the cost of further worsening the Madison competitive situation. (Id., par. 15).

Other Commission decisions on the respective records of the several reallocations proposals ran the range of possible results. These included, e.g., denial of proposals to delete or reallocate VHF channels (*Madison*, 22 FCC 332; *Hartford*, 22 FCC 356); denial of proposals to delete UHF channels in favor of adopting proposals for adding additional VHF channels to the cities (*New Orleans*, 22 FCC 396; *Albany-Schenectady-Troy*, 23 FCC 358); outright deletion and reallocation of VHF channels where not yet in operation (*Peoria*, 22 FCC 307; *Springfield*, 22 FCC 318); some preliminary indication of contemplated deletion of operating VHF channels with further proceedings designated to consider the matter, which are still pending today (*Evansville*, 22 FCC 382; *Fresno*, 22 FCC 365); and outright addition of more VHF channels without relation to the local UHF facilities (*Duluth*, 15 RR 1643; *Charleston*, 15 RR 1635).

Winnebago alone of the parties in the Madison-Channel 3 proceeding (Docket 11734) petitioned for judicial review of the Commission's decisions. Neither of the two Madison commercial UHF stations nor that city's educational UHF licensee did so. The court below unanimously sustained the Commission's action. Its affirmance was primarily grounded upon its earlier decision *en banc* in November, 1955 which had upheld the Commission's general denial of several proposals for "selective deintermixture" of VHF channels (including Madison Channel 3), and the Commission's refusal to "stay" VHF construction permits then

resulting from long-standing comparative hearings (again including Madison Channel 3) pending further administrative allocation proceedings. (*Coastal Bend Television Co.* v. *Federal Communications Commission*, 98 U.S. App. D.C. 251, 234 F. 2d 686 (1956).)

REASONS FOR DISALLOWANCE OF THE REQUESTED WRIT

The court below properly sustained the eminently proper and reasonable Commission decisions to retain the Madison Channel 3 allocation and not to reallocate the said Channel as proposed. The Commission's decisions were sound, consistent with controlling principles of frequency allocations set forth in the Communications Act of 1934, as amended, as well as its policies in pursuance thereof, and amply supported by the factual record in its proceeding Docket 11754. Where—as here—the administrative agency's decisions in an area peculiarly lying within its informed discretion have substantial record support, are clearly reasoned and lie within the bounds of permissible administrative judgment, the necessarily limited judicial review process properly did not interfere to substitute its judgment for that of the agency. (*National Broadcasting Company* v. *United States*, 319 U.S. 190; *Logansport Broadcasting Corporation* v. *United States*, 210 F. 2d 24 (U.S. App. D.C., 1954); *Coastal Bend Television Co.* v. *F.C.C.*, 234 F. 2d. 686 (U.S. App. D.C., 1956); *Rochester Telephone Corp.* v. *U. S.*, 307 U.S. 125, 146 (1939)).

No justiciable issue is raised by petitioner requiring or warranting the grant of the extraordinary relief urged. The substantive legal issue that is raised by the petition (i.e., respondent's question # 1) is

wholly comprehended within the matter of judicial review of an agency's discretionary determination. As the proponent of a change in the rule providing for a channel allocation in which it held no right or interest, petitioner clearly received all of (and actually more than) the procedural rights before the Commission to which it was entitled. (Administration Procedure Act, Secs. 4, 6(d)). The Commission's proceeding provided it proper notice, a more than ample opportunity to file comments and reply comments, and a final decision which properly detailed the basic facts and rational conclusions therefrom, and did so to such a degree as not only to meet all pertinent statutory requirements for rule making but to transcend such requirements and approach the level of the procedures required for adjudicatory hearings on applications. (*Johnston Broadcasting Company* v. *Federal Communications Commission*, 175 F. 2d 351 (U.S. App. D.C., 1949)).

Any basic procedural or substantive questions as might be raised concerning the Commission's actions (such as its statutory power to selectively deintermix particular channels or the legality of its procedures for considering such reallocations), are properly applicable only to existing licenses such as respondent Radio Wisconsin whose rights were threatened with direct invasion and extinction, rather than to mere proponents of rule making changes such as petitioner. No such questions are, however, raised by the instant petition. Finally, petitioner's procedural allegations are (with one minor exception not here urged by it[1])

[1] That one involved the Commission's holding untimely a late-filed Winnebago proposal for a wholly new aspect in the about-to-be-terminated proceeding. (R. 801). Such agency determination

(*Continued on next page*)

fatally defective in not having been asserted before the Commission so as to provide the agency with the statutorily required opportunity to pass upon them,[1] nor contained in Winnebago's petition for review to the court below, and so not properly before that court for review. (Section 405 of the Communications Act of 1934, as amended; *O'Neill Broadcasting Company* v. *Federal Communications Commission*, 241 F. 2d 443 (U.S. App. D.C., 1956); *Democrat Printing Co.* v. *Federal Communications Commission*, 202 F. 2d 298 (U.S. App. D.C., 1952); Section 4 of the Judicial Review Act of 1950; *Stuart* v. *Federal Communications Commission*, 105 F. 2d 788 (U.S. App. D.C., 1939); *WOKO, Inc.* v. *Federal Communications Commission*, 109 F. 2d 665 (U.S. App. D.C., 1939)).

Petitioner's reliance upon the decision in *Chenery Corp.* (318 U.S. 80) is wholly misplaced and provides no support for its novel and fallacious theory as to the individual Commissioner's voting in the several reallocations decisions and their reasons therefor. The Commission's Madison Channel 3 decision stands upon and is amply supported by the public interest facts

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respecting its own processes is properly sustained on review except for the most extraordinary circumstances not here present. (*Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265 (1949)); *Shein et al.*, v. *United States*, 102 F. Supp. 320 (1951), Aff. (per curiam) 343 U.S. 944 (1952)).

[1] In fact, petitioner took the wholly contrary view before the Commission that only bare rule making proceedings were involved, as demonstrated by its admonitions in Docket 11754 that "Rule making proceedings such as this are not adversary proceedings which may turn on niceties of procedure . . ." (R. 809), or that it was " . . a rule making proceeding in which the Commission is not limited solely to the specific record herein made . . ." (R. 391).

and conclusions enunciated by the agency therein—precisely in the manner required by this Court's *Chenery* decision. It is petitioner who would do violence to the *Chenery* principle by going wholly outside of the grounds asserted and relied on by the agency, in an attempt to invalidate the Madison Channel 3 decision on the basis of an individual Commissioner's dissent on a narrow legal ground, in a wholly separate proceeding (involving Fresno Channel 12) in which a diametrically opposite result was reached on its own separate factual record. If the Madison Channel 3 decision were *arguendo* grounded on what the petition inferentially asserts was an erroneous application of a statutory (Section 307(b)) requirement, petitioner has had ample opportunity to seek judicial review thereof. It here, however, fails to do so. The court below having sustained the Commission on this matter of Section 307(b), and petitioner not having directly urged this to be error as a basis for issuance of the requested writ, it should not be permitted to raise this matter in the indirect and circumlocute manner here attempted.[1] Furthermore, that individual Commissioners *arguendo* may not be in general agreement upon the complex legal, policy and factual matters relevant to channel reallocations provides no ground for the assertion of

[1] Without attempting a detailed exposition of this matter, it may be noted that there is little, if any, warrant for petitioner's allegation that denial of the proposed Madison Channel 3 reallocation on the basis of a traditional application of Section 307(b) would have clearly been erroneous. Certainly there are the strongest grounds for upholding the Commission's conclusion that Madison, the capital and central city of Wisconsin, deserved its *first* long-range VHF facility pursuant to Section 307(b) before the smaller and relatively less significant city of Rockford (Ill.) deserved its *second* VHF. (22 FCC, par. 14)

this Court's extraordinary review power. Particularly is this so respecting the instant petition which raises no questions whatever concerning such matters.

Petitioner's generalized and conclusionary (and often factually inaccurate) allegations as to a basic lack of harmony in the Commission's several reallocations decisions, are unfounded, unmeritorious and provide no effective basis for the relief requested. The petition is here comprised of a melange of factual inaccuracies,[1] unsupported conclusions,[2] and bare and superficial comparisons between several agency decisions and hearing records that are not before this Court for review. Such defects are so pervasive that the petition here does not reach the level of rational argument in support of a credible thesis deserving of substantial consideration by this Court. While respondent spelled out to the court below the manner in which the several agency decisions were in essential harmony (each reflecting the application of general criteria to the particular facts there respectively presented), it does not believe such a detailed showing

[1] Thus, for example, petitioner (footnote 1(b), page 13) refers to placing Channel 3 "on ice" (i.e., total non-use) although such matter was never raised by it before the Commission nor in its petition for review to the court below. Furthermore, the Vail Mills Channel 10 decision referred to was soon thereafter reversed by the Commission and that frequency is now in use in that city (23 FCC 358), and Elmira Channel 9 was *not* placed "on ice" as alleged, but the Commission merely preferred to leave the choice as to the city to which it would be reallocated to a later proceeding. (22 FCC 307, 313-5.)

[2] Thus, for example, petitioner's reference (footnote 1(c), page 10) to certain evidence being "no more persuasive than comparable evidence" in six other proceedings, is an allegation wholly unsupported by factual documentation and is in fact incorrect.

to be required or warranted here in light of the wholly haphazard and ineffectual manner in which petitioner herein attempts to raise such issue. Suffice it to note that petitioner's defective technique in no way directly challenges the Commission's Madison Channel 3 decision nor the hearing record which supports it.

Petitioner's final reliance for issuance of the requested writ is on an equally unmeritorious ground in which it attempts on unpersuasive bases to place the instant matter within the ambit of this Court's October 20, 1958 decisions in *WIRL Television Co.* v. *United States,* and *Sangamon Valley Television Corp.* v. *United States,* in which judgments of the court below were vacated. (Cases 235 and 242, respectively.) It seems clear that this Court's decisions in those cases rested upon information as to some reference in Congressional hearings to alleged *ex parte* presentations to individual Commissioners in the *Springfield* (Ill.) case, and the close inter-relationship thereof with the *Peoria* (Ill.) case, those two being closely intertwined in the Commission's own decisions and relatedly being the only two cities in the entire United States in which long-allocated VHF channels had been deleted in order to insulate UHF stations in the communities from competition.

The instant Madison Channel 3 proceeding, however, is distinct and unique in and of itself. This is true not only on the indigeneous facts and circumstances of the separate record in its separate proceeding (Docket 11754), but also insofar as Madison Channel 3 has an allocations history unlike that of any other city in the United States. This Madison proceeding is and was totally devoid of any such *ex parte*

presentations, or even the slightest hint thereof. None are charged by petitioner, and (to the best of respondent's knowledge) no references whatever of any such are found on the record of the Congressional hearings. The Madison-Channel 3 decision, involving the retention of an existing and operative VHF facility located in another part of the country, is not related to any degree to the Peoria or Springfield matters beyond the bare factor that separate proceedings to consider the possible case-by-case application of a general agency policy were held respecting each. This Court having vacated the *WHRL* and *Sangamon* judgments below on grounds other than their merits, the below court's *en banc Coastal Bend* decision remains the controlling rule of law respecting judicial review of Commission actions denying proposals for reallocation. That principle clearly calls for affirmance of the Commission and the appellate court herein.

Nor should *certiorari* lie here, as petitioners contend, solely because the vote of a since-resigned Commissioner was part of the agency's 4-3 majority below. No basis therein is shown, or even alleged in the slightest, to invalidate or in any way cast adverse reflection upon such Commissioner's participation in the Madison-Channel 3 proceeding. There being neither evidence nor imputation of anything wrongful, to accede to petitioner's request here would be to adopt an indiscriminate and disruptive rule of law serving no responsive public purpose.

That the Commission, whatever its changing component membership, has consistently upheld and retained the Madison Channel 3 allocation against

proposals for reallocation is demonstrated by the following *seriatim* reference to the *six* instances over recent years in which reallocation thereof has been considered and rejected:

1. Allocation of Channel 3 at Madison, after rejecting proposals to reserve it for education. (*Sixth Report and Order*, supra; April 14, 1952.) (Commissioners Walker (Chairman), Hyde, Webster, Sterling so voting; Commissioners Hennock and Jones dissenting; Bartley not participating.)

2. Denial of petition for reconsideration of Madison-Channel 3 aspect of Sixth Report and Order. (*Radio Wisconsin, Inc.*, 8 RR 323; Sept. 22, 1952.) (Commissioners Hyde, Webster, Sterling and Bartley so voting; Walker (Chairman) and Hennock dissenting; Jones not participating.)

3. Denial of further petition for reconsideration of Madison-Channel 3 aspect of Sixth Report and Order. (*Radio Wisconsin, Inc.*, 8 RR 467; Oct. 31, 1952.) (Commissioners Hyde, Bartley, Sterling, Merrill, Webster so voting; Walker (Chairman) and Hennock dissenting.)

4. Denial of proposal to institute rule making proceedings for reallocation of Madison Channel 3. (FCC-54-1355, November 1, 1954.) (Commissioners McConnaughey (Chairman), Hyde, Webster and Lee so voting; Bartley dissenting; Hennock and Doerfer not participating.)

5. Denial after hearing of proposals to reallocate Madison Channel 3 (FCC Dockets 11335 et seq.), as part of a group of pilot proceedings respecting possible reallocations. (13 RR 1511, November 10, 1955.) (Commissioners McConnaughey (Chairman), Lee, Mack, Doerfer, and Webster so voting; Hyde and Bartley dissenting.)

6. Denial after hearing of instant proposals to reallocate Madison Channel 3. (Docket 11754—22 FCC 332, February 26, 1957; 23 FCC 53, June 20, 1957.) (Commissioners McConnaughey (Chairman), Doerfer, Mack and Craven so voting; Hyde, Lee and Bartley dissenting.)

CONCLUSION

The decision of the court below being clearly correct and no question calling for further review by this Court properly being raised, the instant petition for writ of *certiorari* should be denied *en toto*.

Respectfully submitted,

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